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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 453

RAY H. GARNER, HARRY BECKERMAN, AIDA BELDNER, JOHN B. BROWN, CARRIE L. DICK, MARY E. GRUNEWALD, EUGENE HALLETT, MARGARET B. HASKELL, EDWARD HAVENS, CORNELIUS LAWRENCE, VERA MANN, OLA ROSS PACIFICO, DANA PLATT, EUGENE REED, FRANCES SCHWARTZ, WILLARD SMART, FRANK TORREANO,

Petitioners,

vs.

BOARD OF PUBLIC WORKS OF THE CITY OF LOS ANGELES; CLARENCE J. DERRICK, JOSEPH O. DONOVAN, LOUIS M. DREVES, FRANK GILLELEN, EDWARD L. TAYLOR, AND MILTON OFFNER, AS MEMBERS OF THE BOARD OF PUBLIC WORKS OF THE CITY OF LOS ANGELES; BOARD OF CIVIL SERVICE COMMISSIONERS OF THE CITY OF LOS ANGELES; SAMSON A. LINDAUER, JUSTIN W. GILLETTE, CHARLES E. ARNN, RANSOM M. CALLICOTT, AND MRS. IDA S. LAZARD, AS MEMBERS OF THE BOARD OF CIVIL SERVICE COMMISSIONERS OF THE CITY OF LOS ANGELES; DAN O. HOYE, CITY CONTROLLER OF THE CITY OF LOS ANGELES; THE CITY OF LOS ANGELES, A MUNICIPAL CORPORATION,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

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PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the decision and judgment of the California District Court of Appeal, Second Appellate District, (R. 40) affirming the

order of the Superior Court of the State of California, in and for the County of Los Angeles, which denied petitioners' consolidated petitions for writ of mandate (R. 32-3). A petition for rehearing in the District Court of Appeal was denied (R. 38). The Supreme Court of California denied petitioners' application for a hearing, three Justices voting in favor of granting such a hearing (R. 47).

Opinions Below

The Superior Court rendered no opinion. The opinion of the District Court of Appeal (R. 40-46) is reported in 98 Advance California Appellate Reports 694. The Supreme Court of California rendered no opinion in entering its order denying a hearing (R. 47).

Jurisdiction

The judgment of the District Court of Appeal was entered July 19, 1950 (R. 40). The order of the Supreme Court of California denying a hearing was entered September 13, 1950 (R. 47).

The constitutional issues here presented were argued in the trial court (R. 7-9); they were argued before the District Court of Appeal on appeal (R. 40-46), and on petition for rehearing (R. 38); and they were argued before the Supreme Court of California (R. 35-40) which Court declined to grant a hearing thereon (R. 47).[1]

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[1] Under California law a hearing in the State Supreme Court after a decision in the District Court of Appeal is discretionary with the State Supreme Court (Calif. Const, Art. VI, Secs. 4 and 4c; Rules 28 and 29, Rules on Appeal for the Supreme Court and District Court of Appeal of the State of California). Petitioners applied for hearing on this case and their application was denied (R. 47). This Court's writ is properly directed, therefore to the District Court of Appeal (*Randall* v. *Board of Commissioners*, 252 U. S. 22; *American Railway Express Co.* v. *Levee*, 263 U. S. 19; *Western Union Telegraph Co.* v. *Priester*, 276 U. S. 252; *Chesapeake and Ohio R. Co.* v. *Mihas*, 280 U. S. 102; *Parker* v. *County of Los Angeles*, 337 U. S. 929.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3) and 2101 (c).

Statute Involved

The issues presented in this case arise out of a compulsory oath and affidavit required of all city employees, as a condition of continued employment, by the City of Los Angeles. The contents of the oath and affidavit are embodied in Ordinance Number 94,004 adopted by the Council of the City of Los Angeles on October 21, 1948 (R. 11) set forth at length in the Appendix annexed hereto.[2]

Statement of the Matter Involved

There are no disputed issues of fact. The decision of the District Court of Appeal overruled the petitioner's claims that the Ordinance deprived them of federal rights guaranteed by the Constitution of the United States (R. 40-46).

The petitioners' consolidated petitions (R. 1-27) sought restoration to their positions in the classified civil service of the City of Los Angeles from which they had been removed for their failure to comply with the requirements of the Ordinance.

Petitioners are citizens of the United States (R. 1) and permanent civil service employees of the respondent, City of Los Angeles (R. 2). The petitioners have been members of the classified civil service for many years holding positions ranging from that of tree trimmer in the case of petitioner Reed to that of equipment operator in the case of petitioner Garner (R. 2).

On or about October 21, 1948 the Council of the City of Los Angeles enacted the Ordinance herein (R. 3). The said Ordinance required employees of the City of Los Angeles to subscribe to an oath of loyalty which included,

[2] Referred to hereafter as "the Ordinance."

among other requirements, an affirmation that petitioners had not within a period of five years prior to the effective date of the Ordinance advised, advocated or taught the forcible overthrow of the Government of the United States or of the State of California, or been members of organizations which so advocated, and to execute an affidavit of past and present membership or non-membership in the Community Party of the United States or the Communist Political Association (R. 18-21).

Fifteen of the petitioners declined to sign either the oath or affidavit (R. 4-5); two of the petitioners, Ola Ross Pacifico and Frances Schwartz, did sign the oath but not the affidavit (R. 5). All seventeen were discharged from their civil service employment (R. 4).[3]

The sole ground for discharge was the failure to execute the required oath and affidavit, and in the case of the petitioners Pacifico and Schwartz, the sole ground for discharge was the failure to execute the required affidavit (R. 4-5). No other ground for discharge of any petitioners was ever asserted or claimed.

Following hearings before the respondent Board of Civil Service Commissioners held on February 10 and February 18, 1949, that Board on March 2, 1949, by one notice addressed to counsel for all seventeen petitioners, sustained each and all of the discharges (R. 25-26).

Each petitioner duly filed a claim for unpaid salaries and an application for reinstatement (R. 6). On or about March 15, 1949 both the request for unpaid salary and the appli-

[3] Rule XVII of the respondent Board of Civil Service Commissioners of the City of Los Angeles provides in part as follows: ". . . but no person in the classified civil service of the city, other than an unskilled laborer employed by the day, shall be removed, discharged or suspended except for cause which shall be stated in writing by the board or officer having the power to make such removal, discharge or suspension, and filed with the Board of Civil Service Commissioners. . . ." None of the petitioners was such an unskilled laborer employed by the day.

cation for reinstatement were denied by respondents pursuant to the Ordinance (R. 6).

It is alleged in the verified petition and not denied that "but for the matter of asserted failure to comply with the provisions of Ordinance Number 94,004, petitioners each performed the services required of him in a competent and satisfactory manner; and petitioners were at all times herein mentioned fit and suitable persons to fill the positions from which they were removed." (R. 6)

As above stated, the petition for writ of mandate was denied by the trial court without opinion; the order of denial affirmed by the District Court of Appeal, Second Appellate District, with opinion; and a petition for hearing denied by the Supreme Court without opinion, three Justices dissenting.

The decision of the court below (R. 40-46) stressed that the "issues involved in this case have been set forth and disposed of in *Steiner* v. *Darby*, 88 Cal. App. 2d 481" (R. 42).[4] The court declared that "one of the foundation stones of private business is that the employee must be loyal to his employer" (R. 45) and that "so long as the employment continues, every employer has the right at any time to ask his employee to declare his loyalty" (R. 45). The court felt that "it is an interesting question whether the legislative power may require disclosure or disavowal of mere beliefs or opinions, without overt acts" (R. 46). The court concluded that the enactment of the Ordinance was constitutionally within the legislative competence.

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[4] The court below made no mention of the grant of certiorari by this Court in the *Steiner* case, and the companion case, *Parker* v. *County of Los Angeles*, 337 U. S. 929, nor the decision of this Court after argument in the said *Parker* and *Steiner* cases, 338 U. S. 327.

Questions Presented

1. Whether, on its face or as applied in this case, the Ordinance constitutes a bill of attainder and ex-post facto law in violation of Article I, Section 10 of the Constitution.

2. Whether, on its face or as applied in this case, the Ordinance deprives petitioners of the liberties of freedom of thought, speech, assembly, association, the right to privacy of conscience, and the right to petition for redress of grievances, without due process of law in violation of the First and Fourteenth Amendments to the Constitution.

Reasons for Granting the Writ

The questions presented in this proceeding raise the same issues as those which were before this Court, but left undecided in the companion cases, *Parker* v. *County of Los Angeles* and *Steiner* v. *County of Los Angeles*, 337 U.S. 929; 338 U.S. 327. The respondent conceded that the questions involved herein were similar to those involved in the Parker and Steiner cases (R. 28), and emphasis on the similarity of the issues was also placed by the court below (R. 42).

This Court granted certiorari in the Parker and Steiner cases (337 U.S. 929) because on the showing before the Court, "serious questions seemed raised as to the scope of a State's power to safeguard its security with due regard for the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment." 338 U.S. 327, 329.

In dismissing the writs of certiorari in the Parker and Steiner cases, this Court noted, after argument, that the "constitutional questions which brought these cases here are not ripe for decision" (338 U.S. 327, 333) because threatened sanctions had not been imposed and because the California courts had not had the opportunity to pass

upon the claims of petitioners in the event such sanctions were imposed.

None of the factors which led this Court to postpone its decision of the constitutional questions raised in the Parker and Steiner cases is present here. This case is "ripe for decision". The issues raised herein are concededly the same which prompted this Court to grant certiorari in the Parker and Steiner cases. Sanctions have been imposed and explicitly because of refusal to comply with the loyalty oath and affidavit requirements of the Ordinance. All state administrative and judicial remedies have been exhausted. The time to which this Court adverted in the Parker and Steiner cases (p. 332) "for the petitioners to urge denial of a Federal right after the State courts have definitively denied their claims under State law" has arrived.

The court below, in sustaining the power of the City to impose on all its employees the compulsory oath and affidavit over the claims of those employees that they are thereby deprived of fundamental constitutional rights, has decided federal questions of the greatest import which this Court has never determined, and has decided those questions in a manner inconsistent with the principles contained in the decisions of this Court which bear most closely thereon.

The Ordinance punishes and stigmatizes employees for their past opinions and associations. It imposes a political test oath upon employees while in office, compelling them upon pain of dismissal to swear under oath whether or not they have ever been members of the Communist Party of the United States of America or the Communist Political Association, or members of any group or organization which in the past five years advised, advocated or taught the forcible overthrow of the government. The Ordinance

interdicts a class of persons without judicial process and subjects them to serious pains and disabilities. The measure constitutes a bill of attainder. Similar enactments have been uniformly condemned by this Court. Contrary to the view of the court below, the decision by this Court in *American Communication Association* v. *Douds*, 339 U.S. 382 lends no support to the validity of the Ordinance involved herein.

The instant case does not involve the power of a court to supervise the conduct of legislative inquiries nor the power of a legislature to impose conditions for the use of an instrumentality created by the legislature. What is involved here is the power of a municipality to impose a compulsory test oath upon employees in the classified civil service whose performance of their duties as to ability, experience and integrity is not questioned.

The provisions of the Ordinance on their face, and as applied in this case, offend the First and Fourteenth Amendments in that by their very terms they operate directly and specifically on exercises of freedom of thought, speech, assembly and association. The compulsory expression of loyalty required by the Ordinance is contrary to the express guaranties of liberty contained in the Constitution. The City of Los Angeles, and all its officials, are subject to the terms of the fundamental law.

The Ordinance here does not prescribe standards of experience, ability and honesty for its employees. It is not a measure which is devised or intended to preserve the integrity of its civil service system or the independence of its employees. In substance and effect, the Ordinance is a coercive measure, unlawfully imposing political conditions upon citizens in government employ whose ability and integrity are not in dispute. In actual effect, it is the Ordinance which undermines the security of the State

for it abridges basic freedoms upon which the foundations of democratic government rest. The greatest danger to the State is servility of mind.

This Court, it is respectfully submitted, should finally decide these serious constitutional questions. They affect not merely the rights of residents of the City of Los Angeles, but the rights of more than one-tenth of the nation's employed population.[5] Measures similar to the Ordinance here affecting the freedoms of government employees are either presently in force or in immediate contemplation in all parts of the nation (Our Uncertain Liberties, U.S. Liberties, 1947-1948, American Civil Liberties Union, Annual Report, N.Y., p. 23). The resultant conflicts which have arisen and continue to arise between the claims of citizens and the claims of government under the Constitution should be resolved by this Court.

I. The Ordinance is a bill of attainder and ex post facto law imposing punishment by legislative fiat and without judicial trial in violation of article I, Section 10 of the Constitution.

In *Cummings* v. *Missouri*, 4 Wall. (U.S.) 277, this Court stated (p. 325): "The Constitution deals with substance, not shadows. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."

The petitioners have not been discharged because of misconduct in office. Their qualifications for the avoca-

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[5] In July, 1948, 5,596,000 persons were employed by either federal, state or local governments out of a total of 60,312,000 employed throughout the nation. "Survey of Current Business," Department of Commerce, Bureau of Census (1948).

tions which they pursue are not in dispute. The Ordinance here reaches the person; not the calling. The legislative body of the City of Los Angeles has declared (there are no "findings") that citizens in its employ must swear under oath whether or not they have ever been in the past members of specified organizations, the Communist Party of the United States or the Communist Political Association, or whether in the past five years, they were members of organizations which advocated the forcible overthrow of government. Failure to take the oath, and for that reason alone, means discharge from employment, with resultant stigmatization of reputation and serious impairment of the chance to earn a living.

In a long line of decided cases by this Court and various state courts, the following propositions appear to be firmly established: (a) a statute which embodies a legislative declaration or presumption of guilt against a specified organization or class of persons and provides penalties against the designated group, is a bill of attainder; (b) to constitute a bill of attainder it is not necessary that specific individuals or particular organizations be designated by name but it is sufficient if they are described in general terms clear enough to identify them as members of a proscribed group; (c) to violate the constitutional prohibition it is not necessary that the sanctions and penalties be imposed absolutely but it suffices if punishment is inflicted for the failure of the proscribed group to fulfill conditions laid down by the statute. *Cummings* v. *Missouri*, 4 Wall. (U.S.) 277; *Ex parte Garland*, 4 Wall. (U.S.) 333; *Pierce* v. *Carskadon*, 16 Wall. (U.S.) 234; *McFarland* v. *American Sugar Refining Co.*, 241 U.S. 79; *United States* v. *Lovett*, 328 U.S. 303; *In re Shorter* (D.C. Ala. 1865) Fed. Cases No. 12,811; *Ex parte Law*, 35 Ga. 285, Fed. Cases No. 8,126; *Green* v. *Shumway*, 39 N.Y. 418, 36 How.

Pr. 5; *State* v. *Heighland*, 41 Mo. 388; *In re Campbell*, 64 Cal. App. 300, 221 P. 952. See, also, *Ogden* v. *Saunders*, 12 Wheat. (U.S.) 213; The Federalist, Number 44; Note 51 Yale L.J. 1358 "Special Legislation Discriminating Against Specified Individuals and Groups"; Wormuth, Francis D., "On Bills of Attainder" in The Western Political Quarterly, Vol. III, No. 1, March 1950, pp. 52-65.

The Ordinance here falls squarely within the constitutional inhibition and the aforesaid legal precedents. It is a retrospective measure. It deprives persons of rights previously enjoyed, and inflicts disabilities which constitute punishment as severe as loss of liberty. The punishment is inflicted without the semblance of a judicial trial. It presumes persons to be guilty of offenses, either by membership in specified organizations or by membership in organizations which advocate proscribed doctrines; it deprives them of their vocations unless the presumption of guilt be first removed by their expurgatory oath—in other words, the Ordinance assumes the guilt and adjudges the punishment conditionally.

If the Ordinance had in terms provided that the petitioners here are guilty of past membership in the Communist Party or the Communist Political Association or in organizations which advocate the forcible overthrow of government, and deprived them of their office on that account, it is clear that such a measure would contravene the constitutional prohibition against bills of attainder. The Ordinance is not any less obnoxious because it attempts to force the same result through the form of a loyalty oath procedure. "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure . . . It is the duty

of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*" *Boyd* v. *United States*, 116 U.S. 616, 635.

Prior to the enactment of this Ordinance, the burden rested upon the municipality to prove by due process that the civil service employees here were unfit to pursue their vocations because of prior membership in an organization which advocated forcible overthrow of government. It appears clear that the municipality was unable to assume such burden. Thereupon, the legislature shifted the burden upon the employees. The law presumes that there are persons who have belonged in the past five years to organizations which advocate the forcible overthrow of government; it compels persons to swear under oath that they have not been members of such organizations; refusal to take the prescribed oath operates as an admission of guilt and automatically results in dismissal. Thus, what the City of Los Angeles cannot do directly, it has done indirectly. The legislature has punished these petitioners by mere fiat, without any trial or proof of wrongdoing. Compare the critical analysis in *Cummings* v. *Missouri*, *supra*.

The same constitutional vice permeates that part of the Ordinance which requires an affidavit as to whether or not persons have ever been members of the Communist Party or Communist Political Association, as it does the oath of non-membership for the past five years in organizations which advocate the forcible overthrow of government.

In substance and effect, this Ordinance with its provisions for trial of "false swearing" and "disloyalty" (Section 9, R. 13), with its inquisitorial procedures and its provisions for compulsory incriminatory testimony (Section 14, R. 15) has for its manifest purpose the ouster from public employ, with stigma and disgrace, of all those who

are or were members of the Communist Party or the Communist Political Association. The Court below in its opinion (R. 40-46) clearly indicated that the State was not required to employ members of the Communist Party or the Communist Political Association. Moreover, the statement under oath that one was a member of the aforesaid proscribed organizations leads inevitably in the present milieu to ostracism, stigma, inquisition and possible criminal prosecutions, punishments as severe as actual loss of employment. Compare, *Alexander* v. *United States*, 181 F. 2d 480 (C.C.A. 9th, 1950); *United States* v. *Dennis*, 183 F. 2d 201 (C.C.A. 2d 1950); *American Communications Association* v. *Douds*, 339 U.S. 382. "And there comes a point where this Court should not be ignorant as judges of what we know as men." *Watts v. Indiana*, 338 U.S. 49, 52.

What is involved here, both in the oath and affidavit provisions of the Ordinance, is a legislative proscription of certain ascertainable classes of persons from ever engaging in public employment in the City of Los Angeles because of their past membership in proscribed organizations. The Constitution forbids such a result.

American Communications Association v. *Douds*, *supra*, involved an oath concerning present membership in specified organizations. This Court observed that the statute was therefore decisively distinguishable from such statutes as were involved in *Cummings* v. *Missouri*, Ex parte Garland, etc. The individuals involved in the latter cases were in fact being punished for past actions; whereas in the Douds case they were subject to possible loss of position only because there was substantial ground for the congressional judgment that beliefs and loyalties would be transformed into future conduct. "* * *; there is no one who may not, by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affi-

davit" (p. 413). Under the terms of the Ordinance here, no "voluntary alteration of loyalties" can possibly make the petitioners here eligible to take the oath or execute the affidavit.

The constitutional bulwark against bills of attainder was intended to secure fundamental rights of persons and property. "* * * laws of this character are oppressive, unjust and tyrannical; and, as such, are condemned by the universal sentence of civilized man." *Ogden* v. *Saunders*, *supra*, p. 266. There are, however, other profound reasons for the condemnation of bills of attainder.

A bill of attainder is a legislative act, which inflicts punishment without a judicial trial. *Cummings* v. *Missouri*, *supra*, p. 323. But one of the most essential attributes of the American constitutional system is the theory of separation of powers. The legislature is entrusted with the power to make general rules for the order of society; to other departments of government is entrusted the duty of applying these rules to particular individuals. "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of these rules to individuals in society would seem to be the duty of other departments." *Fletcher* v. *Peck*, 6 Cranch (U.S.) 87,136.

Unless this separation of powers is secure, there can be no assurance of impartiality in the treatment of individuals by government. If the power of the legislature is not restrained; if it may act as judge, jury and executioner, then the Constitution is not much more than waste paper, and the lives, liberties and properties of individuals in society may be lost without regard to "the law of the land." This Court has constantly condemned such usurpation of power. *Bailey* v. *Alabama*, 219 U.S. 219; *Manley* v. *Georgia*, 279 U.S. 1; *Western and Atl. R. R. Co.* v. *Henderson*, 279 U.S. 639; *Morrison* v. *California*, 291 U.S. 82;

McFarland v. *American Sugar Refining Co.*, 241 U.S. 79; *Tot* v. *United States*, 319 U.S. 463.

II. The Ordinance deprives petitioners of the liberties of freedom of thought, speech, assembly, association, the right to privacy of conscience and to petition for redress of grievances without due process of law in violation of the First and Fourteenth Amendments to the Constitution.

A. The Ordinance is a comprehensive measure intended as is stated at the outset of the law "to insure the loyalty of the officers and employees" of the City of Los Angeles (R. 11). It provides explicitly for a test oath of loyalty as a requirement for continuance in office.

In order to encourage citizens to enter into the employ of government, every effort has been made in the past decade to avoid the evils of the "spoils system", to free government employees from political influence, to leave them free to act as independent citizens wholly unhampered by the "hydraulic pressures" of the day. Fish, The Civil Service and the Patronage, 1905; Merriam, Public Personnel Problems, 1938; Mosher & Kingsley, Public Personnel Administration, 1941.

The Ordinance here points in another direction. It imposes political conditions upon employees in the classified civil service whose ability and integrity are not in question. Here a municipality has discharged persons with civil service tenure for refusing to take an oath concerning their past, present and future beliefs and associations, a requirement exacted long after such employees had entered into office and faithfully discharged their duties.

Whether the State has the constitutional power to exact such an oath is the question here. "The Constitution may well elicit expressions of loyalty to it and to the government which it created, but it does not command such ex-

pressions or otherwise give any indication that compulsory expressions of loyalty play any such part in our scheme of government as to override the constitutional protection of freedom of speech and religion" dissenting opinion of Chief Justice Stone in *Minersville School District* v. *Gobitis,* 310 U.S. 586, 605; Compare, *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624.

There are limits, as this Court indicated in *United Public Workers* v. *Mitchell,* 330 U.S. 75, 100, upon the power of a State to condition employment in government. See also, *Cummings* v. *Missouri,* 4 Wall. (U.S.) 277, 320-321. Especially are those limits reached when state action intrudes into liberties protected by the First Amendment. "Where the First Amendment applies, it is a denial of all governmental power in our federal system." *Marsh* v. *Alabama,* 326 U. S. 501, 511. There is no power in the state to discriminate between its employees upon grounds that are made to depend upon differences of color, race, nativity, religious opinions, political affiliations or other considerations which, as is conceded in the case herein, have no bearing upon the fitness of the employees to continue in their employment. The State, even as an employer, is still subject to the requirements of the Constitution.

The court below was of the opinion that it was the duty of those charged with the management of the business of government to "insure unconditional, unswerving loyalty of every servant of the people, high or low" (R. 45). The Court did not however meet the crucial issue involved here. The question is whether the means adopted to secure such result were legitimate within the purview of the Constitution. The City of Los Angeles has prescribed standards of "education, experience, knowledge and ability" for incumbents in office. Charter, City of Los Angeles, Section 100. In the application of statutes which on their face pre-

scribe general rules of competence and conduct for employees, it is possible for the State in particular cases to weed out the traitor and the fakir. In such situations, the employee whose livelihood is at stake has the safeguards which due process of law afford him, and the State is protected if once it establishes that the employee has by his activities been guilty of misconduct or incompetence. All that can be claimed under such circumstances is the unconstitutional application in a specific case of a valid statute.

The Ordinance here on its face adopts entirely different methods "to insure the loyalty of its officers and employees." The statute compels an oath of loyalty. It is not an ordinary oath of allegiance to the Constitution. It is an expurgatory oath which is compelled. Unlike the statute in *United Public Workers* v. *Mitchell, supra*, which allegedly sought to preserve the integrity of the citizen's exercise of the franchise by withdrawing government and its employees from some aspects of the electoral process, the Ordinance here actively intervenes to interdict certain ideas and associations, and commands the employees to do the same. The Ordinance is not concerned with standards of conduct or competence; it is concerned solely with coercing opinion and association. The Ordinance does not deprive the criminal or the incompetent of his employment: it deprives those who cannot or will not take an oath which forswears past, present and future beliefs and associations. The Ordinance intrudes into an area completely withdrawn from governmental cognizance by the Bill of Rights. "To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end." *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 636.

B. Under our constitutional system, the coercion of loyalty is unknown. "The idea that loyalty will ultimately be given to a government only so long as it deserves loyalty and that opposition to its abuses is not treason has made our government tolerant of opposition based on differences of opinion that in some parts of the world have kept the hangman busy." *Cramer* v. *United States*, 325 U.S. 1, 21. The American tradition is eternal hostility against every form of tyranny over the mind of man.

The history of centuries attests to the basic truth that the coercion of loyalty is a mistake—a socially harmful mistake. The social concepts of freedom of thought and freedom of speech arose out of ancient struggles against Authority. The loyalty which the Athenians demanded, Socrates refused. Bury, J. B., A History of Freedom of Thought, Lond. 1913, pp. 31-35. A sketch of the history of the struggle against the coercion of opinion would include Milton's conflict with the Censor (Areopagitica, Works IV), the rise and fall of Star Chamber, the refusal of Sir Thomas More to renounce the head of the Catholic Church (Encyc. of Social Sciences, XI, p. 8), the seditious libel prosecutions against Wilkes and Junius, the defense of Stockdale by Thomas Erskine, the religious persecutions which plagued England and Europe for centuries, the persecutions of heretics, the test oaths and ex-officio oaths, the persecutions in 18th century England of the London Corresponding Society, Orange Societies and Anti-Corn Law societies (May, Constitutional History of England, 1889, II, Chs. IX-XIV)—in sum, the wide sweep of important historical events from the advent of civilization which in almost every instance bore in some way on the struggle against coerced loyalty.

In the realm of reason (*West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624), as well as the realm

of conduct (*Chambers v. Florida*, 309 U.S. 227), the forced extraction of men's beliefs or acts are incompatible with a free society. Under our constitutional system, the word "loyalty" defies definition. It has no fixed content. Men experience deep intellectual and emotional shifts in their loyalties many times in their lives. The greatest loyalty sometimes requires hostility to governmental policies and institutions. Those who equate loyalty with conformity misconceive the American tradition. Henry Steele Commager, Who is Loyal to America? in Harper's Magazine, September, 1947; Curti, Merle, The Roots of American Loyalty, N. Y., 1946 "* * * the citizen who thinks he sees the commonwealth's political clothes are worn out, and yet holds his peace, and does not agitate for a new suit, is disloyal, he is a traitor." Mark Twain in the Connecticut Yankee.

It is not only that loyalty laws are inherently contrary to the fundamental law; their illegality lies in the possible abuses and oppression which may flow from their existence. Under such measures, persons in order to exercise their vocations are in effect compelled to hold opinions as to governmental matters deemed by a State officer consistent with loyalty. See, Smith, Alfred E., Public Papers, N. Y., 1923, p. 292; Lehman, H. H., Public Papers, N. Y. 1938, p. 120. "What matters is the existence of the weapon. Once the sword is placed in the hands of the people in power, then, whatever it says, they will be able to reach and slash at almost any unpopular person who is speaking or writing anything that they consider objectionable criticism of their policies." Chafee, Z., Freedom of Speech, 1941, p. 466.

C. Not only does the Ordinance on its face and as applied to the petitioners here abridge constitutional guarantees

of freedom, but by its terms the Ordinance deprives petitioners of their liberties without due process of law.

The provisions of the Ordinance are sufficiently broad to permit the most arbitrary and discriminatory application of its provisions. Section 9 of the Ordinance (R. 13) provides that whenever an appointing authority "is in doubt" as to whether or not an officer or employee swore falsely in or violated an oath required under the Ordinance, the official must "investigate and determine the facts." This Section provides no standards and requires no notice or hearing. All that is required is a "doubt" concerning the veracity or ideological loyalty of the employee. In such event, the appointing authority becomes accuser and judge, whose suspicions need be the only evidence whose determination becomes the sentence.[6]

To have a "doubt" concerning the loyalty of an employee or the validity of his opinions and associations, and to be empowered to investigate and resolve that "doubt", means only that an administrative official may interpret or license or censor opinion and belief, and compel loyalty in accordance with the official's own predilections. Moreover, since this Ordinance deals with past loyalty, with past associations and ideas, it provides the official with an arbitrary and oppressive mechanism for inquisition and thought surveillance.

Under this Ordinance a supervisory official may decide that an employee is disloyal and a perjurer without notice, evidence or hearing. The Ordinance permits, therefore, not only the exercise of a prior restraint upon opinions and associations, but it countenances the imposition of sanc-

[6] The Ordinance sets up an alternative procedure for investigation (Sections 10-23). The procedure may be invoked, however, only by the officials of any department who are unwilling to conduct their own investigation (Section 11). The employee is not authorized to request the alternative procedure.

tions for the exercise of constitutionally protected rights. The Ordinance permits the condemnation of persons for ideas and doctrines to which they do not personally subscribe. Compare, *Schneiderman* v. *United States*, 320 U.S. 118; *Bridges* v. *Wixon*, 326 U.S. 135. It encourages heresy-hunting. Compare, *United States* v. *Ballard*, 322 U.S. 78. "The existence of such a statute which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion which might reasonably be regarded as within its purview." *Thornhill* v. *Alabama*, 310 U.S. 88, 98.

This Court has never held that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution. *Yamayata* v. *Fisher*, 189 U.S. 86, 100. A measure such as the Ordinance here which vests arbitrary and unrestricted power in an administrative official to coerce the loyalty of employees is unconstitutional on its face. "Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas." *Thornhill* v. *Alabama, supra*, p. 97. The power vested in officials under this Ordinance is so vague and ambiguous as to enable the law to be made the instrument of capricious suppression of free speech and assembly. Such measures have never outlived the scrutiny of this Court. *Lovell* v. *Griffin*, 303 U.S. 444; *Hague* v. *C.I.O.*, 307 U.S. 496; *Schneider* v. *Irvington*, 308 U.S. 147; *Carlson* v. *California*, 310 U.S. 106.

Conclusion

Wherefore, the petition for writ of certiorari to the District Court of Appeal of the State of California, Second Appellate District, should be granted.

Respectfully submitted,

JOHN T. MCTERNAN
Counsel for Petitioners Garner, et al.

CHARLES J. KATZ
Of Counsel.

APPENDIX

Ordinance Number 94,004

An Ordinance to effectuate the provisions of Charter Section 432 and otherwise to insure the loyalty of the officers and employees of this City.

The People of the City of Los Angeles Do Ordain As Follows:

Section 1. Every person who is hereafter elected or appointed to an office or position in the service of the City of Los Angeles must, before entering upon the duties of his office or position, take and subscribe to the following oath:

I, ... , do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America and the State of California, and will support and defend the Constitution and laws of the United States of America and of the State of California and the laws of the City of Los Angeles against all enemies, foreign and domestic. I further swear (or affirm) that I do not advise, advocate or teach, and have not within the period beginning five (5) years prior to the effective date of the ordinance requiring the making of this oath or affirmation, advised, advocated or taught, the overthrow by force, violence or other unlawful means, of the Government of the United States of America or of the State of California, and that I am not now and have not, within said period, been or become a member of or affiliated with any group, society, association, organization or party which advises, advocates or teaches, or has, within said period, advised, advocated or taught, the overthrow by force, violence or other unlawful means of the Government of the United States of America, or of the State of California. I further swear (or affirm) that I will not, while I am in the service of the City of Los Angeles, advise, advocate or teach, or be, or become a member of or affiliated with any group, association, society, organization or party which advises, advocates or teaches, or has within said period, advised, advocated or taught, the

overthrow by force, violence or other unlawful means, of the Government of the United States of America or of the State of California, that I will well and faithfully discharge the duties of my office or employment in the service of the City of Los Angeles and that I take this whole obligation freely without any mental reservation or purpose of evasion, So Help Me God.

Sec. 2. Every person who now holds or occupies an office or position in the service of the City of Los Angeles must, within thirty (30) days after the effective date of this ordinance, or if he be on leave or under suspension for cause from the service of the city at such effective date, within thirty (30) days after his return to such service, take and subscribe to the oath set forth in Section 1 hereof.

Sec. 3. Every person who is hereafter elected or appointed to an office or position in the service of the City of Los Angeles must, before entering upon the duties of his office or position, execute an affidavit stating whether or not he is or ever was a member of the Communist Party of the United States of America or of the Communist Political Association, and if he is or was such a member, stating the dates when he became, and the periods during which he was, such a member; provided, however, that no additional affidavit shall be required on account of the transfer, demotion or promotion of any person who has once executed an affidavit under this section or under Section 4 hereof.

Sec. 4. Every person who now holds or occupies an office or position in the service of the City of Los Angeles must, within thirty (30) days after the effective date of this ordinance, or if he be on leave or under suspension for cause from the service of the city at such effective date, within thirty (30) days after his return to such service, execute an affidavit stating the facts required to be stated in the affidavit required by Section 3 of this ordinance.

Sec. 5. Each oath and affidavit required hereunder shall be taken, executed and signed before an officer authorized by law to administer oaths, and the jurat of such officer shall be affixed to the document so subscribed under the official seal of such officer. No officer or employee of the

city shall require or receive the payment of any fee for administering any oath or affirmation provided for herein.

Sec. 6. The form of the affidavit required by Sections 3 and 4 hereof shall be prepared by the City Clerk. The City Clerk shall secure and maintain a supply of printed forms of the said affidavit and of the oath required by Sections 1 and 2 hereof, and shall furnish such forms as may be necessary to officers and employees of the city, to the Board of Civil Service Commissioners and to the heads of the departments of the city.

Sec. 7. The oaths and affidavits required hereby to be executed by officers and employees of the city who are appointed or employed under the provisions of Article IX of the City Charter shall be filed with the Board of Civil Service Commissioners and shall be a part of the officer's or employee's personnel record on file with the said board. All other oaths and affidavits required hereunder shall be filed with the City Clerk.

Sec. 8. It shall be the duty of each appointing power to require each officer or employee to execute and file an oath and affidavit as required hereby.

Sec. 9. Whenever an appointing authority is in doubt as to whether or not an officer or employee subject to his direction swore falsely in or has violated an oath required hereunder, he must investigate and determine the facts or, if he is the general manager of a department, he must either investigate and determine the facts or report the case to the board of commissioners of his department, and in the latter event the said Board of commissioners must then investigate and determine the facts.

Sec. 10. (a) There shall be a committee of three (3) examiners, hereinafter called the "Committee," to investigate the cases hereafter described. One examiner shall be designated by the Board of Social Service Commissioners from among its members, one shall be designated by the Board of Police Commissioners from among its members, and the other shall be designated by the City Attorney from among his assistants or deputies. Such designations shall be made promptly after the effective date of this ordinance,

and certificates thereof shall be filed with the Secretary of the Committee.

(b) The Secretary of the Board of Social Service Commissioners shall be and act as the Secretary of the Committee.

(c) As soon as the examiners are designated they shall meet and elect one of their number as chairman.

(d) The Board of Civil Service Commissioners shall, at the demand of the chairman of the Committee, furnish such stenographic assistance and supplies as may be needed.

(e) Either the Board of Social Service Commissioners or the Board of Police Commissioners may at any time designate another member to succeed the member of such board of commissioners then serving as an examiner, and the City Attorney may at any time designate another of his assistants or deputies to succeed the assistant or deputy City Attorney then serving as an examiner. After the designation of his successor, an examiner shall continue to serve as such until the completion of all pending matters, but the examiner designated as his successor shall upon his designation become an existing qualified examiner for all purposes connected with new matters.

(f) A majority of the examiners then serving may at any time elect another examiner to be chairman instead of the chairman then serving.

Sec. 11. A board of commissioners which is required hereby to conduct an investigation may do so by appointing the members of the Committee as examiners, under Section 89 of the Charter, to conduct the investigation and to submit their report thereon. Such board of commissioners is hereinafter called the "Commission" and the officer or employee to be investigated is hereinafter called the "Respondent." In each such case the provisions hereinafter contained in Sections 12 through 23, inclusive, shall be applicable.

Sec. 12. Such Commission shall transmit to the Secretary of the Committee a copy of its resolution determining that such investigation shall be made and appointing the members of the Committee as examiners to conduct such investi-

gation. The Commission shall embody in such resolution, or transmit with such copy, a statement of the grounds for such investigation. The Secretary of the Committee shall then fix a time and place for beginning the inquiry, and shall give at least fifteen (15) days notice thereof to the examiners, the Respondent and the Commission. The notice to the Respondent shall include a statement of the grounds for the inquiry.

Sec. 13. The Committee shall meet at the time and place fixed and shall then proceed to inquire into the matter. The Respondent shall be present at such meeting and at subsequent meetings of the Committee as directed by the management of his department.

Sec. 14. The Committee shall conduct a full investigation into the questions of whether or not the Respondent swore falsely in or violated any oath executed by him under this ordinance. A member of the Respondent's department designated by its appointing authority shall be present at each session of the investigation and shall present the facts constituting the grounds therefor.

Sec. 15. Any examiner shall have the power to administer oaths and affirmations to witnesses before the Committee. The chairman shall preside at all meetings of the Committee, direct the order of its business, and rule upon the admission of evidence. He may continue a meeting at any stage thereof, and may call a meeting at any time. He shall require the maintenance of order in the meeting room, may expel any disorderly person from the meeting room and may call upon the aid of the Chief of Police for such purposes. Any decision of the chairman shall be overruled at the demand of the other two (2) examiners.

Sec. 16. Upon the demand of an examiner the City Clerk shall issue a subpoena requiring the attendance as a witness of the person sought to be subpoenaed, at a time and place specified. Upon demand of such examiner, accompanied by an affidavit specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the questions involved in the investigation, and stating that the witness has the desired

matters or things in his possession or under his control, such subpoena shall require the production of physical evidence. All such subpoenas shall be issued in the name of the city, and shall be attested with the city seal. The Chief of Police shall cause all such subpoenas to be served by some member of the Police Department.

Sec. 17. The Respondent shall have the right to be present at all meetings of the Committee at which any evidence is received. He shall have the right to be confronted by all the witnesses who testify in the matter and to see or examine all written or physical evidence. He shall have the right to be represented by counsel, to cross examine witnesses other than the witnesses who are called by him, to obtain the issuance of subpoenas for the attendance of witnesses and the production of evidence, and to produce evidence bearing upon the questions under consideration. The Respondent may testify as a witness, and it shall be his duty to testify as a witness at the direction of the appointing authority of his department. All testimony heard by the Committee shall be given under oath or affirmation. Before any evidence is received the chairman shall advise the Respondent of the Respondent's rights, privileges and duties hereunder and of his rights, privileges and immunities under the Constitution of the United States and under the Constitution of the State of California with respect to the Respondent giving testimony which might tend to incriminate or degrade him.

Sec. 18. Each examiner shall be present at all times during every meeting of such Committee; each must hear, examine or view all evidence considered, and must read all documents filed with or received by, such Committee, and each must read all reports proposed to be submitted by any examiner.

Sec. 19. At the direction of the chairman any of the proceedings before the Committee may be reported by a stenographic reporter in the employ of the city, and the report so made shall be transcribed at the direction of the chairman, or the commission. No copy of the transcript shall be delivered to anyone except by direction of the

chairman, and upon the payment of the cost thereof to the City Treasurer, in an amount determined by the schedule of transcript fees now provided in the Code of Civil Procedure of this state; Provided, however, that if upon charges that he swore falsely in or violated an oath executed by him under this ordinance the Respondent is subsequently discharged from his position and requests a hearing before the Board of Civil Service Commissioners, or if such charges against the Respondent are filed with the Board of Fire Commissioners under Section 135 of the charter or with the Board of Police Commissioners under Section 202 of the charter, a true copy of the transcript shall be delivered to the Respondent upon his payment of the cost thereof.

Sec. 20. The meetings of the Committee shall not be public hearings. The Chairman may exclude from the meeting room any person other than the examiners, the Respondent and his counsel and such other persons as may be present at the request of the Respondent; provided, however that if any reporter or any agent of any periodical publication is present at the request of the Respondent, at least one reporter or agent of each other periodical publication shall be allowed to be present. Neither the reports of proceedings before it nor the evidence received and filed by it nor the reports made by such Committee shall be public documents, and no person other than the examiners shall have a right to see or examine such papers or documents, except as provided by Sections 17, 19, and 21 hereof; provided, however, that such papers and documents shall be produced at the direction of the Board of Civil Service Commissioners in any hearing before it.

Sec. 21. When the Committee has considered all of the evidence received by it, it shall conclude its inquiry and shall prepare a written report upon the questions which it has considered. Any examiner who cannot agree with such a report shall prepare a separate report. Each report prepared shall contain a summary of the evidence considered, with findings of fact thereon, and conclusions and recommendations with a statement of the reasons there-

for. A report agreed to by all of the examiners shall be signed by all of them; a report agreed to by two examiners shall be signed by both of them, and individual reports shall be signed by the examiners preparing them. All such reports, together with any transcript of the proceedings and all papers and things filed with or received by the Committee, shall thereupon be transmitted to the Commission.

Sec. 22. Upon its receipt and consideration of the report or reports from the Committee the Commission may adopt, reject or modify any such report in whole or in part, or may reconsider the matter in whole or in part, and shall thereafter take such action, or instruct its general manager to take such action respecting the retention or discharge of the Respondent, as appears to such Commission to be proper or to be required by law.

Sec. 23. Any person who fails or refuses without lawful excuse to attend at any meeting of the Committee, or to produce material evidence in his possession or under his control, as required by any subpoena served upon such person as provided for herein, or who, being present before such Committee willfully refuse to be sworn or to answer any material and proper question when directed by the chairman of such Committee, shall be guilty of a misdemeanor and shall be punishable by a fine of not more than $500.00 or by imprisonment in the city jail for not more than six (6) months, or by both such fine and imprisonment.

Sec. 24. If any provision, section, paragraph, sentence, clause, phrase or word of this ordinance is for any reason held to be unconstitutional or invalid, such decision shall not affect the validity of any other part of this ordinance, and the Council hereby declares that it would have adopted each provision, section, paragraph, sentence, clause, phrase and word herein contained without regard to the adoption at the same time of other parts hereof.

Sec. 25. The City Clerk shall certify to the passage of this ordinance and cause the same to be published in some daily newspaper printed and published in the City of Los Angeles.

I hereby certify that the foregoing ordinance was introduced at the meeting of the Council of the City of Los

Angeles of September 8, 1948, and was passed at its meeting of October 21, 1948.

WALTER C. PETERSON,
City Clerk.

By A. McCOY,
Deputy.

Approved this 29th day of October, 1948.

FLETCHER BOWRON,
Mayor.

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